Supreme Court, U.S.
FILED
05-1430 MAY 8 - 2006
OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID BRUCE BRACKNEY,
Petitioner,

-v-

STATE OF ARIZONA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
STATE OF ARIZONA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

With respect to claims for Constitutionally ineffective assistance of counsel, does Arizona's Appellate System operate free from unreasoned distinctions and to provide Appellants an opportunity to present claims fairly in accord with the dictates of the Federal Due Process and Equal Protection Clauses?

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OPINION BELOW

On March 4, 2004, the Maricopa County Superior Court dismissed Petitioner's Pro-Se Notice of Post-Conviction Relief as untimely filed. *See Minute Entry,* March 4, 2004, attached at Appendices XIII-XIV. Petitioner, through undersigned Counsel, filed a Motion for Reconsideration which the Superior Court denied by Minute Entry, dated June 8, 2004, attached at Appendix XV. By Minute Entry, dated July 28, 2004, the Superior Court denied Petitioner's Motion for Re-Hearing, attached at Appendix XVII. A Petition for Review to the Arizona Court of Appeals was denied without comment on July 21, 2005, attached at Appendices I-III. A Petition for Review to the Arizona Supreme Court was similarly denied without comment on February 8, 2006, attached at Appendices XX-XXI.

STATEMENT OF JURISDICTION

Petitioner respectfully requests that a Writ of Certiorari issue to review the decision of the Maricopa County Superior Court. Petitioner timely filed his Writ of Certiorari within ninety (90)- days of the Arizona Supreme Court's February 8, 2006, denial of Petitioner's Petition for Review, attached at Appendices XX-XXI. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254; and Supreme Court Rules 10 and 13, 28 U.S.C.

PROVISIONS INVOLVED

FEDERAL

Article III, Section 2 of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ...

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1254 provides in pertinent part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the

petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

ARIZONA

Article II, Section 24 of the Arizona State Constitution provides in pertinent part:

> In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel ... and the right to appeal in all cases; ...

Rule 31.19 of the Arizona Rules of Criminal Procedure provides in pertinent part:

> Within 30 days after the filing of a decision or within 15 days after the clerk has mailed notice of the determination of a motion for reconsideration, any party may file with the clerk of the Court of Appeals a petition for review by the Supreme Court.

Rule 32.1(f) of the Arizona Rules of Criminal Procedure provides in pertinent part:

> Subject to the limitations of Rule 32.2, any person who has been convicted of, or sentenced for, a criminal offense may, without payment of any fee, institute a proceeding to secure appropriate relief.
>
> Any person who pled guilty or no contest, admitted a probation violation, or whose probation was automatically violated based upon a plea of guilty or no contest shall

> have the right to file a post-conviction relief proceeding, and this proceeding shall be known as a Rule 32 of-right proceeding.
>
> Grounds for relief are:
> f. The defendant's failure to file a notice of post-conviction relief of-right or notice of appeal within the prescribed time was without fault on the defendant's part.

Comment to the 2000 Amendment of Rule 32.1 of the Arizona Rules of Criminal Procedure states in pertinent part:

> Changes in the first and second paragraphs and in subsection (f) are to meet and accommodate the requirements of *Montgomery v. Sheldon*, 181 Ariz. 256, 889 P.2d 614 (1995) (opinion supplemented, 182 Ariz. 118, 893 P.2d 1281), and its progeny. A petition when authorized under Montgomery is referred to in the above provision as an "of-right" proceeding. Relief pursuant to subsection
> (f) will continue to be unavailable to all post-conviction relief proceedings not "of-right".

Rule 32.4 of the Arizona Rules of Criminal Procedure provides in pertinent part:

> A proceeding is commenced by timely filing a notice of post-conviction relief with the court in which the conviction occurred. ... In a Rule 32 of-right proceeding, the notice must be filed within ninety days after the entry of judgment and sentence or within

thirty days after the issuance of the final order or mandate by the appellate court in the petitioner's first petition for post-conviction relief proceeding. In all other non-capital cases, the notice must be filed within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is the later.

STATEMENT OF THE CASE

Facts and Procedural History of the Case

In March of 2000, Petitioner David Brackney was convicted by the Trial Court of multiple felonies, including two (2) counts of first-degree murder, and sentenced to two (2) consecutive life sentences without the possibility of parole, plus sixty-nine (69) years in prison. By appointment of the Court, Attorney Jeff Zurbriggen represented Petitioner on his first-tier Direct Appeal to the Arizona Court of Appeals. On January 20, 2003, the Arizona Court of Appeals issued its Memorandum Decision denying relief and affirming Petitioner's convictions.

On further Direct Appeal, Attorney Zurbriggen represented Petitioner on his discretionary Petition for Review filed with the Arizona Supreme Court. By Order, dated September 9, 2003, the Arizona Supreme Court exercised its discretion and declined acceptance of the Petition for Review, Arizona Supreme Court No. CR03-0134-PR, and returned the case to the Arizona Court of Appeals for issuance of the Mandate.

On October 9, 2003, the Arizona Court of Appeals issued its Order and Mandate affirming the convictions, indicating copies of the Order and Mandate were mailed to "each party appearing or the attorneys of record." However, neither Petitioner nor Attorney Zurbriggen received a copy of the Order and Mandate or notification of any kind whatsoever that the Mandate had issued. In early February 2004, Petitioner learned that the Mandate had issued based upon research conducted by a fellow inmate at the Arizona State Prison. *See Affidavit of Petitioner,* dated June 21, 2004, attached at Appendices VI-VII. Attorney Zurbriggen first learned that the Mandate had issued upon contact by Mr. Brackney in February 2004. *See Affidavit of Attorney*

Jeff Zurbriggen, dated May 19, 2004, attached at Appendices IV-V.

Attorney Zurbriggen advised Petitioner to immediately file his Notice of Post-Conviction Relief, which he did on February 9, 2004. *See Notice of Post-Conviction Relief,* attached at Appendices VIII-XII. Petitioner's Notice of Post-Conviction Relief requested relief based upon claimed ineffective assistance of Counsel. *Id.*

The Superior Court, by Minute Entry, dated March 4, 2004, dismissed Petitioner's Notice of Post-Conviction Relief as untimely. *See Minute Entry,* March 4, 2004, attached at Appendices XIII-XIV. Petitioner filed a Motion for Reconsideration, and by Minute Entry, dated June 8, 2004, the Superior Court denied Petitioner's Motion for Reconsideration. *See Minute Entry,* June 8, 2004, attached at Appendices XV-XVI. On July 29, 2004, the Superior Court denied Petitioner's Motion for Rehearing. *See Minute Entry,* July 29, 2004, attached at Appendix XVII.

Petitioner then submitted a Petition for Review to the Arizona Court of Appeals, which was denied without comment on July 21, 2005. *See Order,* July 21, 2005, attached at Appendices I-II. On August 25, 2005, Petitioner filed his Petition for Review in the Arizona Supreme Court. On January 12, 2006, the Arizona Supreme Court ordered the State to file a Response to the Petition for Review on or before February 1, 2006. *See Order,* January 12, 2006, attached at Appendix XVIII. On February 8, 2006, The Arizona Supreme Court declined to accept the Petition for Review and returned the record to the Arizona Court of Appeals, Division One. *See Order Denying Petition for Review,* dated February 8, 2006, attached at Appendices XX-XXI. On March 3, 2006, the Arizona Court of Appeals granted Petitioner's Motion to Stay the issuance of the

certified order denying review to and including May 30, 2006. *See Order,* March 3, 2006, attached at Appendices XXII-XXIII. Accordingly, Petitioner now submits this Petition for Writ of Certiorari to the United States Supreme Court.

REASON WHY THE WRIT SHOULD ISSUE

To clarify that "first tier" appellate review for both pleading and non-pleading Arizona criminal defendants on claims of ineffective assistance of counsel is "of-right," notwithstanding Arizona requirement that said claims can only be filed in Post-Conviction Relief Proceedings following direct appeal. And that Arizona's Appellate system must recognize both pleading and non-pleading defendants have an opportunity to present claims for ineffective assistance of counsel fairly and have equal access to the appellate courts in perfecting such claims, including the right to file a late notice of post-conviction relief when said defendants are "without fault" in the untimely filing in accord with the Equal Protection and Due Process Clauses of the Federal Constitution.

On Claims of Ineffective Assistance of Counsel, Appellate Review In PCR Proceedings for Non-Pleading Defendant's is First Tier and, Therefore, "Of Right".

Arizona's State Constitution guarantees that in criminal prosecutions, the accused shall have the right to appellate review in all cases. AZ Const. Art. 2 § 24.

Arizona has a two-tier appellate system. On direct appeal, the Arizona Court of Appeals is the intermediate Court which provides "of right" first-tier appellate review from criminal convictions for non-pleading defendants. Rule 31 *et seq.* At that point, Arizona procedure permits the appellant to apply to the Arizona Supreme Court to hear a second-tier appeal on a "Petition for Review" by leave only. *See* Ariz.R.Crim.P. 31.19. That is, whether the direct appeal will be heard in the Arizona Supreme Court is a discretionary decision.

Unique to Arizona, non-pleading defendants who raise claims of constitutionally ineffective assistance of counsel are required to bring said claims only in PCR proceedings, to be instituted under Arizona Rule of Criminal Procedure 32, upon conclusion of the appellant's direct appeal. For pleading defendants, Rule 32 proceedings are initiated by filing a Notice of Post-Conviction Relief with the Superior Court within ninety (90)-days of imposition of judgment and sentence. For non-pleading defendants, Rule 32 proceedings are initiated by filing the Notice in Superior Court within thirty (30)-days after the issuance of the Order and Mandate in the direct appeal. Ariz.R.Crim.P. 32.4.

Under Ariz.R.Crim.P 32.1(f), a pleading defendant seeking first tier appellate review on the basis of ineffective assistance of counsel may file an untimely notice of Post-Conviction Relief (PCR) when he is "without fault" in the untimely filing. However, according to the ruling of the Superior Court, a non-pleading defendant similarly without fault seeking first tier appellate review on the same issue may *not* file an untimely notice of PCR. The Superior Court reasoned that Petitioner's "notice is not 'of right' because he has had his direct appeal to the Court of Appeals" and; therefore, Petitioner "is not entitled to any relief under Rule 32.1(f)." *See Minute Entry, March 4, 2004,* attached at Appendices XIII-XIV.

However, the Superior Court fails to recognize both pleading and non-pleading "without fault" defendants raising claims of ineffective assistance of counsel are in the same position: both are barred from raising such claims on direct appeal, both may only raise such claims through PCR proceedings, and both must have a fair opportunity, and equal access to the Appellate Court, in perfecting such claims. Accordingly, if a pleading "without fault" defendant may file an untimely notice of PCR, then Equal

Protection and Due Process demand that the same right must be given to a non-pleading, "without fault" defendant. With regard to claims of ineffective assistance of counsel, not to accept the "without fault" non-pleading defendant's untimely notice of and petition for PCR would compromise access to that defendant's State Court right to appeal and, thus, his right to Equal Protection and Due Process under the Fifth and Fourteenth Amendments of the U.S. Constitution.

Petitioner's Right to Appellate Review on Claims of Constitutionally Ineffective Assistance of Counsel.

In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense. U.S. Const. Amend. VI. *See also Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.2d 674 (1984). In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel. Ariz. Const. Art. II, § 24. Further, the right to assistance of counsel continues in a criminal case through the first appeal. *Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.E.2d 811 (1963). The duties of counsel in an appellate matter are concluded when counsel informs the defendant of the status of the appellate matter and of defendant's future options, unless counsel's review reveals further issues appropriate for submission to the court. *State v. Smith,* 184 Ariz. 456, 458, 910 P.2d 1 (1996).

In Arizona, Claims of Ineffective Assistance of Counsel Cannot be Raised on Direct Appeal and Must be Raised in PCR Proceedings.

In *State v. Spreitz,* 202 Ariz. 1, 39 P.3d 525 (2002), the Supreme Court of Arizona clarified that ineffective assistance of counsel claims are only to be brought in PCR proceedings. *Spreitz,* 202 Ariz. at 1. Any such claims

improperly raised in a direct appeal are not to be addressed by Appellate Courts regardless of merit. Appellate Courts simply will not address them. *Id.* Therefore, because Petitioner had no right on direct appeal to raise his claims of ineffective assistance of counsel, Appellate review of those claims under Rule 32 is first-tier and, therefore, "of right".

In 2000, the Arizona legislature amended Ariz.R.Crim.P. 32.1 to bring the rule in line with the Arizona Supreme Court's decision in *Montgomery v. Sheldon,* 181 Ariz. 256, 889 P.2d 614 (1995) (opinion supplemented, 182 Ariz. 118). *See* Comment to 2000 Amendment, Ariz.R.Crim.P. 32.1. These Amendments ensure that a criminal defendant can file a notice of PCR after its due date if the PCR proceeding is "of right". Ariz.R.Crim.P. 32.1(f). However, the legislation failed to include a non-pleading defendant's claims of ineffective assistance of counsel within the definition of an "of right" proceeding. Ariz.R.Crim.P. 32.1.

In *Montgomery,* the Arizona Supreme Court held, ***all criminal defendants in Arizona are constitutionally guaranteed appellate review.*** *Montgomery,* 181 Ariz. at 261. Further, the Court noted that because a pleading defendant cannot bring a direct appeal, "a Rule 32 PCR is the only way a defendant can exercise that right after pleading guilty". *Id.* Accordingly, the Court in *Montgomery* held that a pleading defendant must be allowed to file for Rule 32 PCR ***even when untimely*** (assuming defendant can show good cause) to avoid violating the defendant's State Constitutional right to appeal. *Id.* The Court stated,

> Our Constitution guarantees that in criminal prosecutions, the accused shall have ... the right to appeal in all cases. But a ... defendant in a non-capital case who pleads

> guilty ... waives the right to direct appeal. Thus, for such defendants ... a Rule 32 proceeding is the only means available for exercising the constitutional right to appellate review.

Id. at 258 (citations omitted). The Court continued,

> Trial Courts, therefore, should grant defendants an appropriate extension upon such a showing [of good cause]. Only then can defendants fully enjoy the access to appellate review that Art. 2 § 24 guarantees.

Id. at 261.

The Arizona Supreme Court's reasoning in *Montgomery* must also apply here. As stated above, just as a pleading defendant can appeal through a Rule 32 PCR, the only way a non-pleading defendant can appeal on the basis of ineffective assistance of counsel is through a Rule 32 PCR. *Supra.* For the same reasons pleading defendants, who are without fault, must be allowed to file late PCR's, non-pleading "without fault" defendants appealing on grounds of ineffective assistance of counsel must also be allowed to file late PCR's. Under the Arizona Supreme Court's reasoning in *Montgomery,* denying a non-pleading defendant, who seeks Appellate review on the basis of ineffective assistance of counsel, the right to file a late PCR would violate the defendant's State Constitutional guarantee of appellate review. *Montgomery,* 181 Ariz. at 261.

As stated above, Rule 32.1(f) was amended to give life to the *Montgomery* Court's holding that a defendant be allowed to file a late PCR when denied the right to a direct appeal. Because a non-pleading defendant appealing on an ineffective assistance of counsel basis is in the identical

position, such a defendant's notice of PCR should similarly be treated as a first-tier "of right" appeal for purposes of Rule 32.1.

On Claims of Ineffective Assistance of Counsel, the Federal Constitution's Equal Protection and Due Process Clauses Require That Both Pleading and Non-Pleading Defendants Have a Fair Opportunity to Present and Equal Access to the Appellate Courts in Perfecting Such Claims.

This Court has repeatedly held that the Federal Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. However, if a State has created Appellate Courts as "an integral part of the ... system for finally adjudicating the guilt or innocence of a defendant," the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution. *Evitts v. Lucy,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d. 821 (1985) (citing *McKane v. Durston,* 153 U.S. 684, 14 S.Ct. 913, 38 L.Ed. 867 (1894)); *Jones v. Barnes,* 463 U.S. 745, 103 S.Ct. 3308, 3312, 77 L.Ed. 2d 987 (1983). *See also Eskridge v. Washington State Board of Prison Terms and Paroles,* 357 U.S. 214, 215, 78 S.Ct. 1061, 1062, 2 L.Ed.2d 1269 (1958) (*per curiam)* (invalidating State rule giving free transcripts only to defendants who could convince trial judge that "justice will thereby be promoted"); *Burns v. Ohio,* 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959) (invalidating State requirement that indigent defendants pay fee before filing Notice of Appeal of Conviction); *Lane v. Brown,* 372 U.S. 477, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963) (invalidating State procedure providing for free transcript only for a defendant who could not satisfy the trial judge and his appeal was not frivolous).

The Superior Court's failure to allow Petitioner's late notice of PCR violates his Federal Constitutional Right to Equal Protection and Due Process. The defendants in *Montgomery* were allowed to file late PCR's and here the same has been denied to Petitioner. Petitioner is in the same position as the defendants in *Montgomery*: he was "without fault" and, therefore, has shown good cause for the untimeliness of his notice, and he is prohibited in Arizona from raising the issue on direct appeal.

Accordingly, Petitioner's Constitutional Right to Equal Protection requires that he be afforded the same right to file a late PCR as were the defendants in *Montgomery*. *See also State v. Pope*, 130 Ariz. 253, 635 P.2d 846 (1981). In both situations, each defendant is filing an untimely notice; each defendant has claims of ineffective assistance of counsel; each defendant is raising such claims for the first time; each defendant is raising claims that could not have been raised at an earlier procedural state. The Equal Protection Clause of the Federal and State Constitutions require that the similarly situated defendants be treated equally. Failure to afford the "without fault" non-pleading defendant the same late filing right provided to pleading defendants violates Equal Protection. When the State chooses to provide an appellate review to a given class of litigants, the State cannot enact measures that arbitrarily deny effective appellate review to any particular subclass of the class of litigants. The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages,' *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 24, 93 S.Ct. 1278, 1291, 36 L.Ed.2d 16 (1973). However, it does require that the State Appellate System be 'free of unreasoned distinctions,' *Rinaldi v. Yeager*, 384 U.S. 305, 310, 86 S.Ct. 1497, 1500, 16 L.Ed.2d 577 (1966).

Failure to allow appellate review also violates the non-pleading defendant's right to Due Process. As this

Court noted, "the Court's decisions concerning access to judicial processes..., reflect both Equal Protection and Due Process concerns". *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996). Here, Petitioner has arbitrarily been denied access to the judicial process. In a similar case, the Federal Court, Northern District of Ohio, held that a statute that required filing a notice of appeal within thirty (30)-days from the date of mailing the administrative decision violated Due Process. The Statute failed to provide a "good cause exception" to claimants who demonstrated they did not receive timely notice of the Administrative Decision from which they wish to appeal. The Court held:

> While it is true that Plaintiff may not have an inherent constitutional right to be heard after the Board of Review denied his claim, since Ohio has given him the right to appeal his decision, it must grant him a means within his control to exercise that appeal.

Bennett v. Lopeman, 598 F.Supp. 774, 782-84 (N.D. Ohio 1984) (citing *Griffin v. Illinois*, 351 U.S. 1276 S.Ct. 585, 100 L.Ed 891 (1956)); *Robinson v. Beto*, 426 F.2d 797 (5th Cir. 1970).

The Third Circuit Federal Court of Appeals similarly recognized,

> When a defendant does not first become aware of his right to appeal until more than forty days after his sentencing, a strict application of the Federal Rules so as to effectively deny the defendant's right to appeal would create a ***harsh result indeed.*** Accordingly, we adopt the view that the mandatory time limit for perfecting an

> appeal does not begin to run until the defendant is actually notified of his rights.

U.S. v. Deans, 436 F.2d 596, 599 (3rd Cir. 1971) (emphasis added).

Likewise, many other Courts have allowed untimely appeals in the interests of justice. *See Butler v. U.S.*, 388 A.2d 883, 885 (D.C. Ct. App. 1978) (allowing defendant to file appeal two days late); *U.S. v. Houser*, 804 F.2d 565, 569 (9th Cir. 1986) (allowing defendant to file late appeal where counsel had told defendant she would pursue appeal options and failed to do so); *U.S. v. Ford*, 627 F.2d 807, 811 (7th Cir. 1980) (allowing defendant to file late appeal, noting "Court of Appeals have the power to overlook irregularities where fairness and justice so require").

Here the Superior Court arbitrarily denied Petitioner a meaningful opportunity to exercise his right to appellate review simply because of his status as a non-pleading defendant. Appellate review for both pleading and non-pleading Arizona criminal defendants on claims of ineffective assistance of counsel is "of-right," notwithstanding Arizona requirement that said claims can only be filed in Post-Conviction Relief Proceedings following direct appeal. Arizona's Appellate system must recognize Due Process and Equal Protection require both pleading and non-pleading defendants have an equal opportunity to present claims for ineffective assistance of counsel fairly and have equal access to the appellate courts in perfecting such claims, including the right to file a late notice of post-conviction relief when said defendants are "without fault" in the untimely filing of the notice.

CONCLUSION

Petitioner respectfully requests this Court grant the Petition for Writ of Certiorari and enter its Order reversing the Superior Court and remanding this case with instructions to accept Petitioner's Notice of, and Petition for Post-Conviction Relief. The failure to timely file was "without fault" on the defendant's part and it was his "of right" State Constitutionally guaranteed first tier appellate review of ineffective assistance of counsel claims, entitling Petitioner to relief pursuant to the authority set forth above, as well as Rule 32.1(f) or it's "without fault" equivalent. Petitioner has shown valid reason and good cause for the Trial Court to accept late filing of his Notice of Petition for Post-Conviction Relief, and such is ***required*** in order to protect his State right to appeal guaranteed by his Federal Right to Due Process and Equal Protection.

Respectfully submitted,

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